

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1440

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1440

B
P/S

UNITED STATES OF AMERICA,
APPELLEE,
-vs-
VALDEMAR DaSILVA PEREIRA,
APPELLANT.

On Appeal From The United States District Court
For The District Of Connecticut

APPELLANT'S REPLY



PETER GOLDBERGER
ASST. FEDERAL PUBLIC DEFENDER
770 CHAPEL STREET
NEW HAVEN, CONNECTICUT 06510
(FTS) 8-643-8148
ATTORNEY FOR APPELLANT

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STATUTE INVOLVED

8 U.S.C. §1105a. Judicial review of orders of deportation
and exclusion--Exclusiveness of
procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5 [now 28 U.S.C. §§2341-2351] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title . . . except that--

....

Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; . . . determination of motion; dismissal of indictment upon invalidity of order; appeal

(6) if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. . . . [T]he determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

....

Habeas corpus

(9) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

[Statute continued on following page]

Exhaustion of administrative remedies . . .

(c) An order of deportation . . . shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

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UNITED STATES OF AMERICA,
APPELLEE,

-VS-

VALDEMAR DaSILVA PEREIRA,
APPELLANT.

APPELLANT'S REPLY

In his motion to dismiss the indictment charging him with reentering the United States without permission after being "arrested and deported," 8 U.S.C. §1326, the defendant offered to prove that the order under which he had been removed from this country lacked a Constitutionally adequate basis in fact. He contended that Congress did not intend such orders to underlie convictions under §1326, and that, in any event, the Constitution protected against such convictions. In its brief on appeal, the government chiefly contends that this

defense is barred by the terms of 8 U.S.C. §1105a(a)(6, 9) and (c). The appellant did not address this provision in his principal brief.

The appellant's defense is not precluded by 8 U.S.C. §1105a.

During his deportation hearing in 1965, Mr. Pereira admitted the convictions charged in the Order to Show Cause, without admitting that these convictions rendered him deportable. (R. Doc. #8, Tr. [Dec. 7, 1965] at 3-4.) He did not appeal administratively the order of deportation entered against him, nor did he seek review in any court.^{1/} Under 8 U.S.C. §1105a(c), no court may review a deportation order "if the alien has not exhausted the administrative remedies available to him under the immigration laws and regulations." Moreover, the procedure set forth in 8 U.S.C. §1105a(a)(1-8) (petition for review in Court of Appeals on administrative record) is to be the "sole and exclusive procedure" for "judicial review of all final orders of deportation."^{2/}

^{1/} Similarly, he did not appeal or contest in court any of the subsequent reinstatements of that order under 8 U.S.C. §1252(f). See 8 C.F.R. §242.23 (1977); cf. Gagliano v. INS, 353 F.2d 922, 928 (2d Cir. 1965) (underlying order may not be reviewable under such circumstances).

^{2/} The government's description of this scheme, as set forth in its brief at 6, is not quite accurate as it relates to the availability of habeas corpus as an alternative means of review under 8 U.S.C. §1105a(a)(9). See U.S. ex rel. Tanfara v. Esperdy, 347 F.2d 149 (2d Cir. 1965); U.S. ex rel. Parco v. Morris, 426 F. Supp. 976, 978 n.4 (E.D.Pa. 1977), citing INS v. Stanisic, 395 U.S. 62, 68 n.6 (1969); Cheng Fan Kwok v. INS, 392 U.S. 206 (1968); Foti v. INS, 375 U.S. 217, 231 & n.19 (1963).

Contrary to the government's contention in this case,^{3/} these provisions do not bar the defense he raised to the criminal charge against him.

A. Exhaustion of Administrative Remedies.

First, the requirement of 8 U.S.C. §1105a(c) that judicial review of deportation orders be preceded by exhaustion of administrative remedies "available to" the alien poses no problem, because the issue which the defendant raises is not within the competence of the immigration authorities, and thus no administrative remedy has ever been "available to" him. Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976). Clearly, constitutional attacks on state court convictions are not subject to determination by officials of INS. Aguilera-Enriquez v. INS, 516 F.2d 565, 570-71 (6th Cir. 1975). Cf. Moore v. East Cleveland, 431 U.S. 494, 497 n.5 (1977)(plurality opinion)(failure to seek administrative variance is no bar to constitutional defense in criminal prosecution under zoning ordinance); id. at 529 (Burger, C.J., dissenting: "inadequate . . . remedies make exhaustion inappropriate").^{4/} Indeed, as the Supreme Court has stated:

^{3/} The government has argued otherwise in other cases. See United States v. Mohammed, 372 F. Supp. 1048, 1049 (S.D. N.Y. 1973).

^{4/} In any event, no administrative opportunity is now "available to" Mr. Pereira to attack his order of deportation. See 8 C.F.R. §242.21 (1977)(administrative appeal must be filed within 10 days). To deny a defense in a criminal case for lack of exhaustion under such circumstances would be particularly unwarranted. See Moore v. East Cleveland, 431 U.S. 494, 497 n.5 (1977)(plurality opinion); McKart v. United States, 395 U.S. 185, 196-97 (1969).

[footnote continued on p.4]

[U]se of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. This deprivation of judicial review occurs not when the affected person is affirmatively asking for assistance from the courts but when the Government is attempting to impose criminal sanctions on him. ... We must ask, then, whether there is ... a governmental interest compelling enough to outweigh the severe burden placed on [the defendant].

McKart v. United States, 395 U.S. 185, 197 (1969).

As in McKart, there is no such governmental interest here. First, INS can have no interest in being afforded the meaningless "opportunity" to review a constitutional challenge to the factual underpinnings of its order which is beyond its authority to adjudicate. Second, as the Supreme Court observed in McKart, allowing the defense asserted here will not encourage other aliens to "bypass available administrative remedies." 395 U.S. at 199. One must:

4/ (Cont'd) The "glaring" point made by the government at such relative length in its brief (pp. 8-10), that Mr. Pereira did not attack his convictions in state court or seek a waiver of excludability and permission to reenter before allegedly returning illegally again, is utterly irrelevant to the issues in this case. Even if state "declaratory relief" under Conn. Gen. Stat. §52-29 is an independent postconviction remedy, a very doubtful proposition in the absence of any authority so applying it, or if Mr. Pereira were to obtain a pardon and erasure under Conn. Gen. Stat. §§18-24a & 54-90, these rulings would not affect his immigration status. See Hernandez-Almanza v. U.S. Dept. of Justice, INS, 547 F.2d 100, 103 (9th Cir. 1976). And the suggestion that he should not have a defense to a charge of reentering without permission because he did not seek permission is nothing more than an absurd contention that if the government can prove one element of the offense, the defendant should not be able to contest another.

doubt whether many [aliens] will be foolhardy enough to deny [INS] the opportunity to correct its own errors by taking their chances with a criminal prosecution and a possibility of [two] years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of [aliens] will exhaust all administrative remedies Accordingly, ... where there appears no significant interest to be served in having the [INS] decide the issue before it reaches the courts, ... [the] failure to appeal [within the administrative process] should [not] foreclose all judicial review.

Id. at 200. For these same reasons, the government's reliance on 8 U.S.C. §1105a(c) is misplaced.

B. Exclusive Judicial Remedy.

Similarly, the "sole and exclusive procedure" language of 8 U.S.C. §1105(a) does not bar the trial court from considering the appellant's defense. First, the statute contains no explicit reference to prosecutions under 8 U.S.C. §1326. The statute provides that in prosecutions under 8 U.S.C. §1252(e) (formerly §156) for wilfull failure or refusal to depart or apply for necessary documents after being ordered deported, and in criminal cases under §1252(d) for wilfull failure to submit to required supervision while under a deferred order of deportation, the validity of the underlying deportation order may be challenged by a motion to dismiss. 8 U.S.C. §1105a(a)(6). This subsection neither expressly includes nor excludes prosecutions under 8 U.S.C. §1326, the statute involved in this case. Despite the apparent sweep of its terms, §1105a is not

all-inclusive in its coverage of the powers of courts to review orders entered in deportation cases. See, e.g., 8 U.S.C. §1329 (declaratory and injunctive jurisdiction of district courts). In the absence of unambiguous words, then, Congress cannot be said to have forbidden the kind of limited trial court review which the defendant sought here. As the Supreme Court put it very recently in an opinion by Justice Rehnquist construing a statute much clearer in its intent to preclude trial court review of an administrative order than that at issue here:

[A] survey of the totality of the statutory scheme does not compel agreement with the Government's contention that Congress intended that the Administrator's [determination] should be conclusive in a criminal prosecution. At the very least, it may be said that the issue here is subject to some doubt. Under the circumstances, we adhere to the familiar rule that, "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." United States v. Bass, 404 U.S. 336, 348 (1971).

Adamo Wrecking Co. v. United States, 46 U.S.L.W. 4063, 4065 (U.S. Jan. 10, 1978).

In addition, even if Congress has sought to prevent plenary district court scrutiny of deportation orders in prosecutions under 8 U.S.C. §1326, the trial court still has the responsibility of determining whether the alien has allegedly "been ... deported" within the meaning of §1326. Cf. Adamo Wrecking, supra, at 4065; accord, id. at 4068 (Stevens, J., dissenting)(whether regulation defendant allegedly violated

is "emission standard" under Clean Air Act). Two Circuits have expressly said that the word "deported" in 8 U.S.C. §1326 means "deported according to law." United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975)(per Moore, J., 2d Cir., sitting by designation); United States v. Bowles, 331 F.2d 742, 749 (panel), opinion denying rehearing, 334 F.2d 325 (per curiam, en banc)(3d Cir. 1964). Cf. United States v. Heikkinen 221 F.2d 890, 892 (7th Cir. 1955)(prosecution under former 8 U.S.C. §156 [now §1252(e)] prior to enactment of §1105a). Thus, at a bare minimum, the trial court should have examined the defendant's contention that his order of deportation was issued without "reasonable, substantial, and probative evidence," 8 U.S.C. §1252(b)(4); cf. id. §1105a(a)(6) [relating to review of motions to dismiss prosecutions under §1252(d) and (e)], because it was based solely on convictions unconstitutionally obtained, and that he had therefore not "been . . . deported" within the meaning of §1326.

Finally, the defendant's motion to dismiss in this case was grounded on a contention that could not have been resolved in the "sole and exclusive procedure for . . . judicial review" under 8 U.S.C. §1105a(a) which the government contends forecloses his claim now. Aguilera-Enriquez v. INS, 516 F.2d 565, 570-71 (6th Cir. 1975); see Marino v. INS, 537 F.2d 686, 691-92 (2d Cir. 1976). If the statutory scheme were construed to foreclose its consideration before the criminal trial as well,

the scheme would violate the Due Process Clause of the Fifth Amendment. This is the situation the Supreme Court referred to when it declared that:

such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity.

Yakus v. United States, 321 U.S. 414, 446 (1944). In this case, "there would not be adequate means of securing appropriate judicial relief in the course either of the statutory proceeding or of the criminal trial." Id.^{5/} Such a result is unconstitutional because it would:

subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision

....

The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. ... The finding that the alien is [deportable] does not require proof beyond reasonable doubt but may be made on mere preponderance of the evidence. ... No statute of limitations applies in some cases

Having thus dispensed with important constitutional safeguards in obtaining

^{5/} This, of course, is the obvious difference between the present case and the posture of a defendant facing an escape charge who seeks to attack his underlying conviction. See Gov't Brief at 6-7. Every such defendant has already had a full opportunity to contest the judgment against him by an adequate judicial procedure.

an administrative adjudication that the alien is guilty of conduct making him deportable on the ground that it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. We think it cannot make that use of such an order.

....

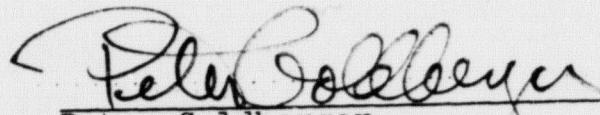
While we would not join in a strained construction of the Constitution to create captious or trivial obstacles to solution of this problem [of illegal aliens], we cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself.

Spector v. United States, 343 U.S. 169, 177-80 (1952)(Jackson & Frankfurter, JJ., dissenting from refusal of Court to consider this issue where it had not been raised by the petitioner). See also Adamo Wrecking Co., supra, at 4067 (Powell, J., concurring); id. at 4068 n.* (Stewart, Brennan & Blackmun, JJ., dissenting). The government's position in this case would lead directly to a confrontation with this constitutional problem, while the appellant's construction of the statutes would avoid it. For this reason as well, the government's arguments should be rejected.

CONCLUSION

For the foregoing reasons, and for those set forth at length in the appellant's principal brief, the judgment of conviction should be reversed.

Respectfully submitted,



Peter Goldberger
Asst. Federal Public Defender
770 Chapel Street
New Haven, Connecticut 06510
(FTS) 8-643-8148
Attorney for Appellant

Dated: January 23, 1978

CERTIFICATION

I hereby certify that two copies of the foregoing Appellant's Reply have been mailed to Hugh W. Cuthbertson, Esq., Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 23rd day of January, 1978.



